United States District Court
Southern District of Texas

Case Number: H-04-2387

ATTACHMENT

Description:

☐ State Court Record ☐ State Court Record Continued

☐ Administrative Record

☐ Document continued - Part II of IV

☒ Exhibit(s) number(s) / letter(s) # 102

Other: P/tf's First Amended Petiton Habeas Corpus

this as being something that they were hired to do. I don't know how many times I read grievance reports that said, Take your problem to the major. One of the biggest problems that I found in administrative segregation particularly is that an inmate can't see a major. Very often does everything in his power to get the major to come see him so he can talk to someone. I guess what I am sharing with you is this absence, this almost total void of anybody who tries to help that inmate do what he should and can do with that kind of an assistance. And what you have over here with the correctional officers, their role is to control and they will control in whatever way they feel it's necessary.

Q. What impact do you think it has on the relationship between the prisoner who has perceived needs and the correctional officer who may not have time or inclination to try to meet those needs? What impact do you think the absence of the classification counselors or any substitute has on the

interaction between inmate and the correctional officer?

A. In prisons -- I visited at one time every major prison in the United States, but in prisons they're called by different names and for purposes here generically we'll say classification counselor. The classification counselor is the bridge between custody and the inmate. There are some very, very good correctional officers that are out there that want to do the right thing. Classification counselors have helped them,

advised them, shown them how this can be done, sort of act as the intermediary in terms of how correction officers get along with inmates. With the void that exists now, it very often unfortunately becomes a case of we against them and the inmate body sees the correctional officer as they call them, the cops, the police. They are not people that they can turn to, in their minds, for help.

Q. Did you have any observations of a systemwide nature about the situation with prisoners trying to get the major's attention or the attention of other kind of rank, what kind of conflict that created in the system?

A. I would ask you to just build on that a little so I'm sure that I understand.

Q. Well, what's jacking in a slot? What's jacketing a slot?

THE COURT: What is what?

MS. BRORBY: Jacking a lot. Jacking a food slot.

THE COURT: I still don't understand.

THE WITNESS: I would really ask counsel not to use inmate jargon, because I think it's confusing to everybody, including the record. Just ask me the question and I'll answer.

BY MS. BRORBY:

Q. Have you observed in any of the use of force reports, reports of a situation that starts with an inmate extending his arm through a food slot in a segregated situation and force ensuing?

A. There is innumerable -- and if anybody doubts this, they just merely need to go review any two months' use of force reports. So many of them begin with the fact that an arm or a towel or something is put outside the food slot so that it can't be closed.

Q. And did you learn why arms were sticking out of food slots?

A. Nine times out of ten the only reason is that the inmate has some hope that he can talk to rank. Somebody above a correctional officer. And he's willing to take the serious consequences of what he's doing, because he knows that if he leaves it out there, that what they're going to do eventually is come in, gas him, bring an extraction team in, all for the purpose of closing food slot.

Q. Did you observe similar conflict where inmates were purporting anyway to attempt to speak to rank by withholding food trays in their cell in administrative segregation?

A. There's always a difference of opinion - and that's

understandable - why inmates do some of the things they do. I would have to, and in my opinion, conclude that the majority of cases that I reviewed were efforts on the part of the inmate to talk to someone and they saw this as a method of doing it.

One case that came to my attention -- I wasn't there personally, but I reviewed the incident report. This particular inmate had climbed up the side of the cages on the windows until he was some 20, 25 feet above the ground, refused to come down.

He was ordered to come down and didn't. It happened to be that there was a central office assessment team visiting that same day and they came in and the psychologist that was a part of this team then talked the inmate down. I'm using this as an example, because in most cases if inmates are given the opportunity to talk about what it is that they're trying to demonstrate by inappropriate behavior, you can bring about a reasonable responsible kind of solution.

Q. Did you have any observations about how usual or unusual it was to have that kind of event where there was some serious talking about a problem before force was invoked as a method to avoid force?

A. I found, and in this case it had to be based on the record, or based on, and it would still be the record, and that is the use of cameras with the -- with the audio opportunity to hear what has occurred.

One case might illustrate best a situation of that

kind. The inmate was in the rec area and wouldn't leave. He stated when officers demanded that he come out that he would leave if the major would come and talk to him. After a good deal of verbal exchange back and forth, the major came with a five point -- I mean, a five-person extraction team. The major made no effort on the record, nor did in reviewing the audio section of the camera film make any effort to do other than, You are ordered to put your hands out through the port. That was

done three times. But there was no effort that was -- that I was able to identify that the major said, I'll talk to you. I'll listen to you. It's -- it's a willingness and it's the best thing in terms of staff protection that I can think of is you exhaust everything you can to see if you can't find a solution short of using force.

BY MS. BRORBY:

Q. Did you see in the documentation you reviewed more than one case like the one you just described where before gas was used the only verbal interaction was to order the inmate to do whatever he was being ordered to do and tell the inmate that if he didn't do it he would be gassed?

A. Yes, I -- and I don't know how the Court wishes to use identification of inmates. I've shared both names and numbers with parties. I always hesitate to ever use a name.

THE COURT: Just use the number, will be all right.

THE WITNESS: Okay. An example -- in this particular

case the inmate was in ad seg day room. He refused -- he also refused to come out. He asked to speak to rank. The team came. The major also came. Refused to talk to him. A 37-millimeter gun was fired five times. The inmate was subdued, claims that he was kicked in the eye by the sergeant during the process. The medical report indicated that there was retina bruising, vision went from 20/20 down to 2200. He grieved the incident, was denied. He had a past history of use of force under the

certain -- same kinds of circumstances. One of the occasions his head was kicked, he had seven stitches in his head. I could give you many other examples of use of gas and then resulting force. In no case was there a danger to the institution at that time. At no case was there a danger to that inmate or to staff when an extreme use of force was precipitated.

Q. In those cases -- in any of those cases that you're referring to was there a documented attempt, either in the videotape or in the use of force reporting to have -- to engage the inmate in a substantive discussion with whatever the inmate's problem was that was causing him to be recalcitrant and not move under threat of gas?

A. As I indicated earlier, I could find none. I am not saying that it never occurred. I'm saying that there is no documentation. And having been an old medical accreditation person in the field of corrections, I've been informed and taught by doctors that if it isn't in the record, it didn't

happen.

Q. In addition to the kind of incident that you have been describing with the use of chemical agents on prisoners in confined settings when there is no risk posed and no apparent attempt to use alternatives to force, are there other examples that you can share with us of the kind of wrongful force that you found on a systemwide basis in the Texas Department of Corrections?

A. Yes. And I'll try to do this very quickly. As I say, I picked out cases that aren't unusual. These are cases, though, that represent occurrences in all kinds of units and with both genders. The first case is 474317. This is a young woman who was handcuffed. She was hit in the face and with her arms handcuffed behind her back they were jerked up, breaking her upper arm. 72 hours ad seg even before she was taken to a hospital. She filed a grievance. An IA was involved and no fault was found at any point.

Another case of a woman, 620484, she passed a letter to another inmate, was seen. The two of them were taken inside and strip searched. The letter was given to them. One inmate was allowed to go, the second was asked to be strip searched again and a digital observation or search made. She refused. She was taken to the infirmary and for several hours stood against the wall and observed, all times handcuffed. She was then put on a gurney with her arms handcuffed -- hands

handcuffed behind her back. Her clothes were cut off, and a lieutenant made both a vaginal and a rectum digital search. There was a nurse present. The nurse refused to make the examination and did not have any part in it.

I cite this case regardless of the Department of Corrections perhaps coming back and saying it's permissible to have correctional officers make such searches, but I am sure -- I am absolutely sure that there was no intention in developing

that policy to ever have it applied to female offenders with vaginal searches made by untrained personnel.

Another case. This is a man who had been with the Gang 7 since 1989 and he was locked up in ad seg because of it.

Q. Do you have his number?

A. I was going to give it at the end, but 490569. He was taken to the shower area under restraint and placed -- and they call it a legal cage, but a small cage right next to the shower area, waiting his turn. There's no question that he was talking loudly and was told a number of times to keep quiet, but he didn't, so the officer opened the cage, rammed him against the back of the cage, tried to throw him to the floor by himself, was unable to. The inmate held on to the small table inside the cage and then four or five officers came and forced him to the floor and put him in restraints. He was taken to the hospital with injuries. He was charged with striking an officer. I indicate this case because he was under restraint, he could not

strike the officer and he was under total control until the officer independently and by himself opened that cage.

The next case, 636644. This is an inmate in October of '96 who was being escorted to the shower. He was in administrative segregation. He's in boxer shorts, in shower shoes. Otherwise naked. He was handcuffed behind his back. There was no soap in the shower and he asked for it. I'm sure that he didn't ask for it appropriately. He was told there

wasn't any soap and they weren't going to get it. I'm sure that there was a good deal of verbal confrontation. But as a result, he was slammed to the ground, became unconscious, was finally taken to the infirmary, where it was found that he had a serious laceration to his chin and a broken jaw. I emphasize this case because he's under constraint. He's certainly not in fighting clothes at the time. There was no reason for him to try to accomplish anything. And although he may have been - I do not know this - verbally abusive, there was no protection needs for the serious damages that resulted.

Another case, 531735. This inmate had been -- this inmate had had a mastectomy just five days before this incident and had his left arm in a sling with --

THE COURT: Before --

THE WITNESS: -- the stitches still in.

THE COURT: Before we go forward with this incident, we'll have the noon hour recess. The Court will be in recess

for one hour.

(Recess at 12:00 p.m., until 1:00 p.m.)

THE COURT: You may resume your direct examination.

MS. BRORBY: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY MS. BRORBY:

Q. Mr. Breed, when we broke for lunch you had just begun discussing the case involving the prisoner with the number

531735. Is that the case of Mr. Batiste?

A. Yes.

THE COURT: Is this the broken jaw case?

MS. BRORBY: Your Honor, this is the mastectomy case.

BY MS. BRORBY:

Q. This is Mr. Batiste, I think.

A. That's correct.

Q. Who actually testified before the Court about that incident.

A. Since the inmate has had the opportunity to testify and present his case, I won't go into any detail other than the fact that obviously an injured inmate, who was in no position to be a threat, after he was restrained and put on the ground was kicked in the ankle, which was broken, and it was five days before even a cast was applied. I think the important aspect of this case, though, is that he submitted a grievance, which was denied. He was charged with staff assault and went from an S-4 to an L-1,

plus 15 days of solitary. The warden signed off on this case and the IAD did not investigate the case.

The next one I would like to share, is this is an inmate that was being - and I'll get the number and the name - was being escorted to the shower under restraint. He, in the report by the officer, was moving too slowly and the officer slammed him into a sliding metal door. The officer claims the inmate wouldn't move fast enough and he was forced to use that

kind of force. As a result, there were eight staples placed in the laceration to the head, bruises to the shoulder. He was found guilty of trying to pull away from an officer while under restraint. No action was taken by the warden or the Internal Affairs. It's interesting, however, that -- on this case 705122.

The next case was during a shakedown. The inmate obviously was loud and abusive. The sergeant claims that the inmate turned aggressively towards him. The inmate claims that he was grabbed by the back of the neck. Regardless of who's right, he was slammed into the edge of the shower door several times with five stitches required to the head. The officer in his statement said he was guided to face the shower door and struck his head on the metal door. The warden found no fault with the sergeant, however, he did reprimand the officer for failing to ensure that the camera was on wide angle.

Q. Was that inmate restrained?

A. Yes. The last case, and I have many, but I think this is enough to give examples, was an inmate who wouldn't give the officer his homemade cap. He was put into restraint and allegedly jerked free of the hold that they had on him. By the reported self, there were a number of officers there at the time. He was placed on the floor and was badly beaten. He had a laceration to the left eyebrow, right eye was punctured -- ruptured, cut to the chin, contusions to the cheek. All of this

on a five-foot-eight-inch, 130-pound inmate who is hardly a threat.

Two other things about this case that I would like --

Q. Is that really five foot eight inches?

A. Five foot eight inches and 130 pounds.

I would like to share, though, also, that on this particular case there were 24 inmates who were listed as refusing to give a statement. I found this on many, many cases - this one, as many others that I did as well - I went to check with inmates that allegedly had refused to make a statement. Out of the 24 I was able locate six, all stated that they were never asked to give a statement.

I think that we'll talk about that more at a later point, but the effort to get statements is a serious problem in being able to determine the facts.

Q. Have you --

A. Unless Counsel wants more cases, I would think that would

be sufficient to indicate the area.

Q. In the course of the work that you described earlier during your testimony, have you had occasion to investigate the issue of use of force in systems or institutions outside of TDCJ?

A. Yes, I have. In almost every prison and jail case, one of the conditions to which I was responsible for monitoring was excessive use of force. One of the things that I was disappointed in finding in Texas, because I had every hope that

that condition had been addressed with the addition of additional officers, was that there was so much use of force in greater amounts and in greater degree of the excessiveness that I found here than I found in any other state system that I have looked at.

Q. Let's move on to the formal policies and procedures concerning the process that has been or will be further described by the witnesses for addressing use of force in the system, a process for complaints for use of force and investigation of uses of force.

A. I was impressed initially when I reviewed the policies and procedures in the department, because I thought in most cases they were very good, but what they really require is a great deal of paperwork, and even the paperwork is not functioning adequately.

Let me go through them rather rapidly. But the first thing that happens with the use of force is that the officer who

is responsible for the use of force has to make out a report. Now, as I indicated earlier, I reviewed over 500 of these use of force reports, and my estimate is that well over 70 percent of those clearly showed excessive force being used. You have to remember, however, that this report includes officer's perspective of what happened, nothing more. It's the officer's perspective. Secondly, witnesses sometimes extensively -- I'm surprised at the number of officer witnesses that evidently were

a part of the use of force by the number that are in each packet. They are almost verbatim to what the officer who initially used force stated. You get the impression, at least, that peers take a look at what the original incident report said and then they make a very similar kind of comment.

Q. Is that unusual in your experience in your investigations of the use of force in other systems?

A. It's not unusual because I think you will always find that within the fraternity of correctional officers, they're going to support each other. But the fact that there are three other witnesses, correctional officers who are peers who say exactly the same thing as the reporting officer raises questions. Particularly in view of the fact that it is required as part of the report that there be an inmate statement.

Now, of all of the cases that I reviewed, less than five percent of them had inmate statements. What they do have is a requirement that the inmate refused to make a statement and

two officers sign indicating that they are approving that as a submission.

I made very strong language in my statement, which I later amended during the deposition. I'm not accusing correctional officers of falsifying records. What I am saying is that it's rather unusual that almost all cases the inmate refuses to make a statement when the next day he puts it down in a grievance. The grievances indicate that the inmate did want

to make a statement and either wasn't allowed to or wasn't allowed the necessary forms.

The next thing that concerns me about the use of force report is that there is no investigation made by the supervisor or the middle management level to determine actually what the facts are. I've already indicated that inmate witnesses seldom are used and more often you find this group witness form saying that everybody in that area listed by name refused to make a statement.

Now, this package then goes to the warden --

Q. Let me stop you for a minute. What makes you think that there is no investigation by a supervisor?

A. I have to respond by saying that there is nothing in the file that would indicate there was. I looked very diligently for this. I asked majors, I asked captains, and they said that that was not their responsibility to carry on any form of an investigation, even though that would be part of a supervisor

and a manager's responsibility regardless of whether it was use of force or any other incident. That's the first line of defense to get the facts.

Q. How does this compare, in your experience, with use of force systems in other prison systems in terms of documentation of a supervisorial investigation into the facts of what happened?

A. I have always found, I don't believe that there is any --

any facility or agency, correctional agency, that I have found that didn't put heavy emphasis on first-line supervisors making a thorough investigation of use of force. And, secondly, that that be reviewed very carefully, even to the point of doing additional interviewing by management before it goes to the warden.

Q. In your opinion is that an important part of a use of force system in curtailing excessive and unnecessary force?

A. If you don't have that in your system from a system standpoint, you are not addressing the way that enforcement of policies and procedures is carried out in every walk of life. This is a systemwide problem that prior to going to the warden there isn't the information that would be necessary for him to make any kind of a valid, reasonable decision.

When it gets to the warden, and this is prepaid by a clerical-type person which has a checklist to assure that each one of these reports, witness reports, medical report, et

cetera, is in the package, it then goes to the warden and one would assume that the warden would then carry on some kind of an investigation himself or at least would write some kind of a statement, but unless the warden makes a determination that he wants to have a hearing, which is seldom done, all he does is make a check mark saying that he has completed all of the documents that are required by policy, signs it, and sends it on into region and to Huntsville Central.

Q. And how does that level of warden involvement in the review of the use of force compare with other systems with which you're familiar?

A. A system that -- any system that I have found that has really tried to address this because it was a problem just in terms of the numbers of cases that were occurring, it becomes of the highest priority for the warden not to just sign a form, but for the warden to know exactly what's happening. If there's any question in his mind, then he or she should carry out additional investigations, either themselves or by someone else that they have the utmost confidence in.

Now, in those few isolated cases where I said that the warden did have a hearing, the hearing consists of the officer and any of the officer witnesses coming in and repeating what has already been put into the record in the way of statements. Inmate witnesses do not get called and the inmate against who the force was used is not called.

Really about all the warden does at that juncture is either, one, decide that the action was appropriate and closes the matter; two, he might want to let the Internal Affairs department review it, and he would refer it to them; or, three, he himself awards punishment.

Now, the second avenue by which an inmate has the opportunity to bring the use of force to the attention of administrators is by filing a grievance. It's interesting to

note that there are more use of force reports coming through the grievance procedure than there is through the official use of reports going up through the line.

The grievance officer has a responsibility not to personally investigate. Generally speaking, in talking to grievance officers, they review to see that the paperwork is there. And if the paperwork is there, they're satisfied to send the package on to the warden. If in the eyes of the grievance officers there is some question that he feels it should be answered, then he turns it over to custody and asks for a report.

I found few cases in where it was turned over to a management major, captain or lieutenant to review, but in every case in which that procedure was followed, I found that the major or the captain or the lieutenant quoted from the original officer's statement and said that the action was appropriate.

The grievance then is returned, denied in every single

case around use of force. The inmate does have the right to appeal the grievance to the second level, but I found in no case where it was grieved to the second level did the second level approve of the grievance or in effect ask for anything further in the way of investigation.

What the grievance does do, however, and it seems to be sort of the end of the trail, is that they make a referral to the Internal Affairs division.

However, before we speak about that process, let me state that there is no feedback whatsoever from the IAD back to the grievance officer or back to the warden that could be found in any record to indicate whether they accepted the case, whether they opened the case, whether they closed the case administratively, or whether they sustained the case.

It would appear to me that the unit level, both grievance and warden, depend upon the IAD as a way of shifting the responsibility for any further investigation to that entity. So the last group would be the IAD. They receive from the warden, from the grievance officer or from outside elements, parents, relatives, sometimes even legislators. It is, however, within their total discretion to whether they even open the case.

I would suggest that the number of cases that they open are far fewer than what one would expect if you were having a vigilant group that was overseeing what was happening within

the department. And I think the most --

Q. What's your basis for that conclusion?

A. Pardon?

Q. What is it that makes you think that if they were being more vigilant about the use of force issue in TDCJ that the IAD would open more cases?

A. I believe that if it was a requirement, as an example, that the IAD had to report back to the warden on every single case as

to whether or not they were going to open it for investigation, and secondly, if they decided not to, the reasons for their taking that position, which would then also allow the warden a second opportunity to make a decision as to whether or not further investigation should be carried on. It's the sheer numbers of cases that are -- are transferred to the IAD and the relatively small number that are open that brings me to the conclusion that I made.

There's a great deal of difficulty for law enforcement personnel to investigate law enforcement personnel. One only has to have even limited experience working with our police agencies across the country and the great difficulty they have with their Internal Affairs groups of getting them to go out in terms of reviewing what their peers are doing, and there is a tendency to always look at it favorably from the standpoint of the officer.

However, Texas was very, very wise in setting up their